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By E-mail

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
Suite 400
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: Revised Definition of Investment Advice and Related Exemptions

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates this opportunity to comment on the Department of Labor's (the "Department") proposed regulation and accompanying proposed and amended exemptions (collectively, the "Proposals") that would redefine who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 ("Code").¹ Prudential is a leading provider of guaranteed lifetime income solutions both in defined contribution plans and Individual Retirement Arrangements ("IRAs"). As such, we support regulation that protects the interests of consumers and enables us to provide products that meet their needs. Fundamentally, we believe that regulation should provide consumer protections while ensuring IRA owners and plan participants continue to have access to the quality products and services they need for a secure retirement. A workable best interest standard along with a definition of investment advice that is reasonable in scope could achieve that goal.

However, we believe that certain aspects of the Proposals run counter to and present significant obstacles to the Administration's goal of enhancing Americans' retirement security by encouraging access to and utilization of guaranteed lifetime income. As we explain below, we strongly believe that the Proposals should be revised to accomplish the objectives stated by the Department and the Administration, and to avoid the unintended practical consequences of reducing access to guaranteed lifetime income products and advice at precisely the moment they are most urgently needed by American workers, and raising the costs of products and services that ultimately would be available to them. In this regard, we offer the following comments in the hope that the Department endeavors to protect IRA owners, plans, and participants through a best interest standard that does not harm those investors through the unintended consequences described herein.

¹ Any capitalized terms not defined herein shall have the meaning set forth in the Proposals.

I. INTRODUCTION

A. Who We Are

Prudential is a financial services leader with a 140-year history and approximately \$1.2 trillion of assets under management as of March 31, 2015, operating in the United States, Asia, Europe and Latin America. Through our subsidiaries and affiliates, we offer a wide array of financial products and services, including annuities, retirement-related services, mutual funds, investment management, and life insurance. We offer these products and services to individual and institutional customers through proprietary and third-party distribution networks.

Prudential's mission and business strategy are largely devoted to helping individuals and families meet their financial needs for retirement. We offer investment products (e.g., mutual funds) and insurance products to help them accumulate assets for retirement and protect those assets so that they may generate guaranteed income in retirement. We believe we know our customers well and why and how they buy our products.

Prudential is an industry-leader in designing and delivering retirement products and services – both within and outside of qualified programs and IRAs.² Prudential's group retirement business, which offers retirement plan solutions for public, private, and non-profit organizations, serves over 5,100 plans with \$183 billion in retirement account values under plans to which full-service plan recordkeeping services are provided as of March 31, 2015, for more than 3 million plan participants and annuitants. That business is also the leading provider of guaranteed retirement income solutions in defined contribution plans. Based on a survey of insurers that offer in-plan lifetime income guarantees and Prudential's own information, Prudential guarantees applied, as of December 31, 2013, to 47% of all assets subject to insurer guarantees under plans of all sizes covered by the survey and 72% of all assets subject to insurer guarantees under plans with \$10 million or more in total plan assets covered by the survey.³

Prudential's annuities business is one of the nation's leading variable annuity providers⁴ with customer account values of \$161.127 billion as of March 31, 2015. The annuities division offers retirement savings-accumulation and income certainty solutions to financial professionals who include our products in a holistic financial plan to their customers on a qualified and non-qualified basis. Our products are distributed through selling agreements with Prudential Advisors,⁵ third party broker dealers, and banks. Variable annuities comprise a large portion of Prudential's annuities business, which is regulated by the SEC, FINRA and state insurance departments. Prudential Advisors' financial professionals serve more than 450,000 IRAs (including individual retirement annuities). Our asset

² An "IRA" can mean either an individual retirement account described in Code Section 408(a) or an individual retirement annuity described in Section 408(b). Some annuities are held within an IRA account and some are simply an IRA annuity.

³ LIMRA Secure Retirement Institute In-Plan Guarantee Availability; Election Tracking Survey, 2014 Results, and Prudential's group retirement business.

⁴ As of March 31, 2015, Prudential Annuities was number two in variable annuity assets under management and number four in variable annuity sales sold by financial professionals. See Sales - VARDS Q1'15 (Advisor-sold, excludes group/retirement plan contracts).

⁵ "Prudential Advisors" is a brand name of The Prudential Insurance Company of America and its subsidiaries.

management businesses are collectively ranked by Pension and Investments as the world's 11th largest institutional asset manager (based on December 31, 2014 assets under management).

Our U.S. Group Insurance business offers a full range of long-term and short-term group disability, and group corporate-, bank- and trust-owned life insurance, primarily to institutional customers for use in connection with employee and membership benefits plans. The business is a top provider of group life and disability insurance. We also sell accidental death and dismemberment and other ancillary coverage, and provide plan administrative services in connection with the group insurance coverage. Group Insurance has its own dedicated sales force and distributes primarily through employee benefit brokers and consultants. As of December 31, 2014, Group Insurance was ranked 2nd in the U.S. in group life insurance premium in-force with 14.18% of the market share, consisting of 11,000 policies and nearly \$2 trillion in face amount of coverage in-force.⁶

Within the retirement industry, Prudential has industry-leading experience in designing and offering guaranteed lifetime-income products. As a provider of defined benefit solutions and services for over 90 years, Prudential has gained a unique insight into how individuals use and value guaranteed lifetime income. We also have seen lifetime income products help many Americans without traditional pensions prepare for retirement both within defined contribution plans and when investing through their IRAs. Appropriately, much attention has been focused by the Department and others on encouraging individuals to accumulate sufficient funds to provide for a secure retirement. Being a good saver, however, is not enough. Savings must last throughout an individual's lifetime. The prospect of outliving one's savings is disconcerting and a real possibility for even the most diligent saver and successful investor. As the Department has recognized in its support for their availability, lifetime income products can provide a very effective way for individuals to ensure that they will not outlive their savings. We urge the Department to ensure that access to lifetime income products is not undermined by the approach taken in the Proposals, but is rather encouraged and facilitated.

B. Overview of our Principal Comments

While we support consumer protections for retirement investors, after careful analysis of the Proposals, we regretfully conclude, as have the American Council of Life Insurers, the Insured Retirement Institute and the Committee of Annuity Insurers, among others, that without significant changes the Proposals will not achieve the right balance between providing consumer protections and ensuring IRA owners and plan participants continue to have access to the quality products and services they need for a secure retirement. In their current form, the Proposals could have the undesired effect of producing adverse consequences for American retirement savers, including a significant reduction in the availability of information, products, and services that they need to achieve secure retirement outcomes, particularly guaranteed lifetime income solutions such as variable annuities.

The Proposals redefine "investment advice" far too broadly, applying ERISA or ERISA-like standards in a vast range of circumstances never intended by Congress. In doing so, the Department's proposal appears to be inconsistent with the charge of the U.S. Securities Exchange Commission ("SEC") under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to review the appropriateness of extending or establishing fiduciary standards beyond investment advisers. The likely result of this redefinition would be the creation of hundreds of thousands of new

⁶ 2014 PICA Annual Statutory Statement Exhibit of Policies.

investment advice fiduciaries, who would be subject to strict liability for severe prohibited transaction excise tax penalties, among other ERISA and contractual remedies.⁷

The Department proposes new and amended prohibited transaction exemptions that seemingly represent an effort to mandate level pricing for all products designed for individual savers and small businesses, apparently based on an assumption that cost is the sole measure of value for all retirement products. Those exemptions do not reflect the economics of providing financial services to all segments of the marketplace. Rather than enhancing retirement security, the Proposals will likely cause consumers to either lose access to helpful information, valuable advice, and investment choice or ultimately bear the costs of implementing the onerous and unnecessary conditions of the exemptions.

We believe it would be more appropriate for and strongly encourage the Department to defer to the SEC and, if necessary, Congress to make changes on the scale desired by the Department. If the Department proceeds with the Proposals, we believe it should take any and all steps necessary to ensure that the final rules have a reasonable chance of actually benefitting the retirement investors the Department is attempting to assist, consistent with its public commitments to do so. In this regard, we strongly encourage the Department to re-propose the rules taking into account public comment and testimony received on the Proposals.⁸

We also wish to note at the outset that, from our unique perspective as an insurance and asset management leader, there are three important values or principles that we believe have been overlooked in the Proposals:

- The first is that advice is valuable. It is not a commodity and not without cost. Far greater, we believe, than the putative cost of “conflicted” advice, is the risk for retirement savers to not convert their savings into investments or not fully understand how asset allocation can help them reach their goals. Individuals should not have to fend for themselves as investment managers.⁹ Most retirement investors need help. We and our peers are in business to provide that help, and we do it well. We know that from our customers.
- The second is that while they need help, retirement savers are capable of making sound choices if they receive appropriate help accompanied by disclosure of information that is accessible, clear, intelligible and actionable, including information regarding conflicts of interest. It is risky to dictate to retirement savers which investments are best for them by favoring a narrow class of investments that may be appropriate for some but may not be right for most investors.

⁷ Despite an apparent lack of statutory authority, the Department’s Proposals effectively extend ERISA’s fiduciary requirements to IRAs. Because it lacks statutory enforcement authority with respect to IRAs, the Department seeks to rely on enforcement by the plaintiffs’ bar. Relying on the plaintiffs’ bar to enforce regulatory requirements will adversely affect the industry, resulting in increased compliance uncertainty, potentially inconsistent results in different jurisdictions, and significant litigation costs, among other consequences.

⁸ The Secretary and Department officials have publicly acknowledged mistakes and the need for clarification with regard to the Proposals.

⁹ In adopting regulations under ERISA Section 408(g) and Code Section 4975(f)(8), the Department itself recognized the importance of advice, estimating that investor losses associated with an absence of professional assistance at \$114 billion in 2010 alone; an amount far greater than the losses estimated by the Department and the Council of Economic Advisors associated with “conflicted” advice. 76 Fed. Reg. 66151.

- The third is that insurance products are not mutual funds. While they may include investment options from which investors may choose, insurance products additionally provide protection against crucial risks such as declines in investment value that negatively affect retirement income, or living too long or dying too early.

The outline of our principal comments is as follows:

- The Department should narrow the definition of investment advice to exclude routine sales activities and welfare plan recommendations;
- The Department should clarify that the “carve-outs” are non-exclusive safe harbors;
- The Department should expand and clarify the “Seller’s Carve-Out;”
- The Department should expand the “Platform Carve-Out” to IRA customers and to the provision of sample fund line-ups;
- The Department should expand the “Education Carve-Out” to, among other things, encompass all the principles of Interpretive Bulletin 96-1;
- The Department should not pursue the low-cost streamlined exemption;
- The Department should make PTE 84-24 the primary exemption for all annuity contracts and make sure that PTE 84-24 provides comprehensive relief;
- The Department should expand and substantially revise the Best Interest Contract Exemption (“BIC Exemption”); and
- If the Department issues a final rule, it should make the rule applicable within a timeframe of no less than 24 to 36 months after the final rules are published in the Federal Register.

II. DEFINITION OF FIDUCIARY

A. Investment Advice

1. “Directed to” is not synonymous with “individualized” advice and should be eliminated:
Under the Proposals, fiduciary status would result because an investment suggestion is *specifically directed* to an IRA, plan, or plan participant. While a recommendation that is not specifically directed at anyone surely cannot be investment advice, we do not believe that a “specifically directed” recommendation is equivalent to “individualized” advice or particularly relevant to establishment of a fiduciary relationship. In effect, the inclusion of “directed to” serves to create a presumption of fiduciary status in circumstances when it was not intended, expected or agreed upon. The concept of “directed to” adds complexity and ambiguity to investment advice determinations that will only serve to significantly limit one-on-one marketing and communications between providers and potential or existing customers.

In marketing their products and services and providing IRA and plan information, Prudential and others in the industry routinely generate different types of communications aimed at potential customers (including IRA owners and plan participants). These diverse communications are designed to educate and to solicit interest from those retirement investors (retail and institutional) in purchasing those products and services, and/or, in a group plan context, learning about their employer’s plan. Under the Proposal, a mass mailing of brochures or a telephone campaign describing a provider’s products and services could be characterized as “specifically directed” to each recipient. The same characterization also could apply to common web-based marketing that targets potential customers

based on their online activity such as pop-ups. Yet, the recipient of these “specifically directed” communications would not reasonably interpret the information to be anything other than sales or informational material and certainly not as creating a relationship of any kind with the provider, not to mention a fiduciary relationship. If providers cannot contact potential customers without assuming all the burdens and responsibilities of fiduciary status, retirement investors may never learn about products and services that may fit their needs, and the burdens of educating plan participants concerning plan features and services will fall on plan sponsors, thus disadvantaging consumers while increasing overall effort and cost to offer a plan. Moreover, since most defined contribution plans do not offer guaranteed lifetime income distribution options, many consumers who would benefit from the security and peace of mind that only an insured guarantee can provide will effectively be denied access to information about the availability of those products through IRAs.

2. The definition of “advice” should be narrowed: We believe that the definition of “investment advice” should capture only those recommendations made under circumstances when the advice recipient has a reasonable expectation of impartiality on behalf of the financial professional.

First, we request that the Department expressly require that the “agreement, arrangement or understanding” on which advice is conditioned be mutual. While “mutuality” may be implicit in the context of an “agreement,” we believe the term brings both certainty and clarity to the concepts of “arrangement or understanding.” The Department, to the best of our knowledge, has never expressed concern with the term “mutually,” nor identified any particular abuse associated with that term under the current regulation. Given the significant consequences attendant to unintended or inadvertent fiduciary status – not the least of which is fiduciary liability and prohibited transaction excise taxes – we strongly encourage the Department to bring clarity and certainty to any new rule by restoring the term “mutual” as a qualifier of the terms “agreement, arrangement or understanding.”

Second, Prudential strongly believes that paragraph (a)(2)(ii) of the Proposals should also be modified to describe the nature of the *relationship* that is needed to give rise to fiduciary status on the part of the advice provider. In our view, a fiduciary relationship can only be created when a communication with a retirement investor is provided under circumstances creating a reasonable expectation that advice will be provided in the recipient’s best interest.

The objective of the new fiduciary definition should be to impose fiduciary standards only on those who undertake to, or create the expectation that they will, act impartially with respect to the advice recipient. This theme is reflected throughout the preamble to the Proposals.¹⁰

Prudential agrees with the Department that it is appropriate to impose fiduciary standards of conduct on a provider only when there is a reasonable expectation on the part of the advice recipient that the provider has assumed a duty to act impartially and to provide advice that is in the interest of the advice recipient. For these reasons, we recommend that the Department consider the following revision to Section (a)(2)(ii) –

¹⁰ See, e.g., 80 Fed. Reg. 21938 (The proposed regulation “avoids burdening activities that do not implicate relationships of trust and expectations of impartiality.”); 80 Fed. Reg. 21941 (“In each instance, the proposed carve-outs are for communications that the Department believes Congress did not intend to cover as fiduciary ‘investment advice’ and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality.”)

(2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate)

(ii) Renders the advice (A) pursuant to a mutual written or verbal agreement, arrangement or understanding that the advice is individualized to or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA, and (B) under circumstances creating a reasonable expectation on the part of the advice recipient that the advice will be provided in the best interest of the advice recipient.

3. Recommending a fiduciary should not be considered “investment advice”: While we appreciate that the Department believes that recommending a fiduciary is tantamount to rendering investment advice, it is not a concept that is obvious from either the statutory text or the current regulation. We are concerned that taking such a position may dramatically limit the extent to which IRA owners and plan fiduciaries will, going forward, have access to informed assistance and recommendations concerning the financial professionals they may need for investment assistance or prudent plan management. Moreover, it is far from clear what the scope of the “recommending” fiduciary’s liability would be – liability for what might be perceived as an inappropriate recommendation or liability for all the acts undertaken by the fiduciary that he or she recommended. Further, is the “recommending” fiduciary liable for the “recommended” fiduciary without regard to whether the person was recommended for non-fiduciary responsibilities, but was engaged in a broader capacity that encompasses fiduciary responsibility?

4. The Proposals should not apply to welfare benefit plan recommendations: Agents, financial professionals, brokers, and consultants provide a range of information and advice to sponsors of insured welfare benefit plans, including information about the benefits of insurance versus self-funding, the relative financial strength of insurers, differences between various insurance coverages, explanations of key features under competing policies, and pricing. With respect to policy pricing in the group plan context, the information and advice may not be limited to simply identifying differences between competing bids, but the financial professional, agent, broker, or consultant may also evaluate proposed pricing as it relates to the plan’s past and expected experience under the policies. These agents, financial professionals, brokers, and consultants provide valuable information to an employer that helps the employer assess and select an appropriate policy for its plan participants, in many cases based on the unique needs of the employer’s group.

The Proposals substantially expand the circumstances in which persons providing information to plan sponsors, employers or plan participants would be considered “investment advice” fiduciaries. Currently, routine marketing and sales activities for group insurance policies including medical, dental, life, disability, long term care, accidental death and dismemberment typically would not constitute fiduciary advice. If advice provided to welfare plans is potentially investment advice, these marketing activities could result in fiduciary status.

The Department’s justification for expanding the fiduciary definition is entirely focused on retirement investors. We believe that further analysis by the Department is required to determine if and when agents, brokers, consultants, and insurers act as fiduciaries in the sale of insurance products to welfare benefit plans and how the various statutory and class exemptions should apply to transactions involving such plans. This is especially true since the Proposals do not include an appropriate factual record on this point. Accordingly, Prudential recommends that the Department confirm that

“investment advice” as defined in Section 3(21)(A)(ii) does not include a recommendation to purchase, sell or hold an insurance contract or policy used to fund an employee welfare benefit plan.

If the Department wishes to include welfare funding vehicles with investment features in the Proposals as it has publicly stated, we request that the Department clarify that, in the context of welfare plans, investment advice includes only those recommendations made with respect to insurance policies that are “securities” under the Securities Act of 1933. This would provide an easily administered, bright-line test for distinguishing between those insurance policies with customer-selected underlying investments and those without.

Further, if the Department expands the fiduciary definition to welfare plan sales and consulting, Prudential requests that the Department confirm that a discussion with a welfare plan *participant* regarding his or her benefits, including whether to enroll in a particular coverage and at what level is not investment advice. We believe that such a discussion should be subject to fiduciary standards only if made to a fiduciary (or participant) who has the discretion on behalf of the plan to make “investment or management decisions with respect to securities or other property of the plan.”¹¹ While an insurance contract might be considered the “property” of the welfare plan that it funds, it is not the responsibility of a plan participant to make “investment or management” decisions as to that policy. Before the participant selects his or her benefit coverages and levels, the plan fiduciary has already purchased (“invested in”) the policy.

In sum, without further clarification of the Proposals’ scope, Prudential believes that recommendations to purchase many forms of welfare plan insurance contracts, including medical, dental, life, disability, long term care, accidental death and dismemberment, could be subjected to fiduciary standards, while there is nothing in the administrative record to suggest why such a substantial change in the regulatory regime is necessary or appropriate.

B. The Department should clarify that routine sales activities are not investment advice.

1. Marketing of investment management services: Like other insurers, in addition to insurance and annuities, Prudential has various affiliates that offer investment management and advisory services to IRA owners and plans. As noted above, Prudential is among the largest investment managers for plan assets in the industry. Under the Proposals, it appears that the marketing of these services would be interpreted as providing fiduciary advice, even though the manager does not receive any payment for simply marketing the service. The manager does not receive a fee until it is engaged by the customer. We, therefore, request that the Department clarify that the marketing of investment management services is not fiduciary advice under circumstances when the manager does not receive any payment for the marketing or sale of the services even though it may receive an investment management fee if engaged by the customer.¹² We urge the Department in considering this change to avoid any unintended negative implication concerning the marketing of any other service that could fall within the Proposals.

¹¹ DOL Prop. Reg. §2510.3-21(a)(2)(ii).

¹² If the investment manager offers its services and is hired to manage the assets of a plan on a discretionary basis in exchange for an assets under management fee paid on a quarterly basis, he or she will be acting as a fiduciary when it manages those assets and not before. Under the Proposals, fiduciary status would appear to extend to the marketing of the service, because the manager will receive compensation for the management of assets if selected by the plan.

2. Wholesalers: In some cases, Prudential relies on affiliated and unaffiliated wholesalers for its mutual fund, insurance, and annuities businesses to provide information about Prudential's investment products to financial professionals and broker dealers.¹³ Typically, the financial professional or broker dealer (and not the wholesaler) interacts with the IRA owner, plan or plan participant. The wholesaler educates financial professionals about product benefits and is available to answer the financial professional's, or the retirement investor's, product-related questions, but will not make a recommendation to the financial professional or to the financial professional's customer (or anyone else). Although wholesalers occupy a critical role in the process to educate retirement investors, they do not have a direct relationship with investors. The financial professional, not the wholesaler, provides any recommendations to the retirement investor and, at the time it communicates with the wholesaler, the advice fiduciary may or may not already be an advice fiduciary to a particular customer or customers. Particularly with respect to annuities and life insurance products, which are complicated products with varied life insurance company benefits and guarantees, the wholesalers provide an invaluable service in enabling financial professionals to provide accurate and current information to their customers.

To ensure that this valuable product education continues to be provided, we request that the Department confirm the following:

- Neither a wholesaler nor any other person will be deemed a fiduciary adviser solely by providing information or recommendations to a financial professional or other non-discretionary investment advice fiduciary within the meaning of ERISA Section 3(21)(A)(ii). Section (a)(2)(ii) of the Proposals supports this position – fiduciary status is found where the advice recipient is receiving the advice “for consideration in making investment or management decisions.” Thus, even if a wholesaler were to provide investment recommendations to a financial professional who is a fiduciary, it would not be making recommendations to a fiduciary with discretion to act on the advice, i.e., make investment or management decisions. Without this clarification, the result is that a wholesaler could be deemed a fiduciary merely by providing product information to a non-discretionary advice fiduciary.
- A wholesaler does not become an advice fiduciary simply because he or she participates in a meeting in which a financial professional makes a fiduciary recommendation to a retirement investor, provided that the wholesaler himself provides no recommendations to (or in the presence of) the retirement investor regarding either the suitability of the product or the advisability of investing in the product to the retirement investor and instead limits himself or herself to providing information and answering questions about the products' features, benefits and potential value to the retirement investor.

3. Marketing Support Center: Prudential maintains marketing support centers in its retail annuity and insurance businesses and its group retirement businesses. These centers are staffed by employees of Prudential whose responsibilities include product and service support for financial

¹³ A wholesaler is a representative of an insurance company (most often an employee, but potentially an independent contractor) who is an expert in describing the features and benefits of the insurer's products. The wholesaler is not authorized to make a sales recommendation to the financial professional or to a customer of the financial professional.

professionals and wholesalers. Marketing support centers assist in processing product applications, providing documents, illustrations, marketing material and detailed product information. Generally, these employees help the financial professional in completing the sale in compliance with Prudential's processing requirements and generally do not interact with the customer. To the extent that they do, these employees do not make recommendations, rather they are simply responding to a request directed by the sales person for product information from a customer who has been referred by the sales person. This is a ministerial activity in which these employees provide requested information. Like the platform provider who is permitted to provide objective product information based on criteria provided by the retirement investor, the support center employees should be permitted to provide product information without becoming a fiduciary.¹⁴

For these reasons, we request that the Department confirm that the marketing support center staff will not be considered advice fiduciaries (1) when they interact with financial professionals, or (2) when they provide product information directly to a customer or prospective customer at the request of the customer and the customer's financial professional.

4. RFP Responses: Prudential asks that the Department confirm that routine sales activities would not constitute "investment advice" under the Proposals. Specifically, the Department should confirm that a provider's response to a request for proposal ("RFP"), request for information ("RFI") or other request issued by a plan fiduciary is not "investment advice" within the meaning of the Proposals. Plan fiduciaries and their agents (e.g., consultants) routinely issue RFPs, RFIs, and other requests to obtain information about the products and services available in the marketplace and in furtherance of their duty to monitor plan service providers. Plan fiduciaries understand that the response of a service provider to an RFP is merely an offer to sell, not a recommendation to be relied upon. The Department's Proposals, however, raises questions because RFPs commonly request that service providers provide information, such as sample fund line-ups and potential investment strategies designed to meet plan-requested characteristics that could be construed as fiduciary advice under the Proposals. Given the clearly defined roles of the parties in these exchanges, we request that the Department specifically confirm that RFP, RFI and other similar responses do not constitute investment advice. There is simply no reasonable expectation on the part of the requesting plan fiduciary that responses are anything more than sales presentations, albeit individualized, to address the requests or stated needs of the requesting plan fiduciary.

III. INVESTMENT ADVICE CARVE-OUTS

A. The Department should clarify that the "carve-outs" are non-exclusive safe harbors.

Prudential believes that including in the Proposals examples of activities that fall outside of the definition of "investment advice" is helpful; however, we are concerned that the use of the term "carve-out" implies that the described activities would be investment advice but for the specific exception provided by the carve-out. To many readers, a "carve-out" is an "exception." Yet, as the Department itself notes, the carve-outs actually reflect those activities that "Congress did not intend to cover as fiduciary 'investment advice...'"¹⁵ For example, there is no reason to believe that providing investment education of the type described in the Proposals would result in fiduciary status by reason of providing investment advice. The same is true for those providers merely developing a platform and making it

¹⁴ 80 Fed. Reg. 21958.

¹⁵ 80 Fed. Reg. 21941.

available to customers, as recognized by a number of courts.¹⁶ However, the Proposals characterize these activities as “carve-outs” and thus imply that they would be investment advice but for the explicit exception.¹⁷ Prudential recommends that the Department remove any potential confusion by clarifying that the activities described in Section (b) are either non-exclusive examples of non-fiduciary activity or safe harbors by making the following modification to Section (b):

(b) Carve-outs - investment advice. Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section. Each of the carve-outs described below is a safe harbor and a non-exclusive example of circumstances that do not constitute “investment advice” for purposes of section 3(21)(A)(ii).

B. The Department should expand and clarify the “Seller’s Carve-Out.”

Prudential agrees with the Department that it is important to “avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm’s length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals.”¹⁸ Consequently, we support the Department’s inclusion of a safe harbor for incidental advice provided in connection with arm’s length sales, purchases, loans or bilateral contracts between plan investors and financial professionals (the “Seller’s Carve-Out”). Given the breadth of the definition of investment advice under the Proposals, a robust Seller’s Carve-Out is necessary to ensure that customary sales activities can continue and to prevent unnecessary market disruption, particularly in the absence of any compelling economic or other data that supports limiting the scope of such a carve-out.

We are concerned that the Seller’s Carve-Out, as proposed, fails to cover many routine sales activities in which potential customers have no expectation that advice is being provided. Moreover, we are concerned that the proposed limits on availability of the carve-out could undermine the objective of expanding retirement savings opportunities for millions of working Americans, and will limit IRA owners’ access to valuable information, products and services. Therefore, we recommend the following changes:

¹⁶ Courts have recognized that merely offering an investment platform is not a fiduciary act. *See, e.g., Hecker v. Deere & Company*, 556 F.3d 575 (7th Cir. 2009) (Fidelity not a fiduciary where it merely “played a role” in the choice of investment options and plan sponsor retained ultimate authority over which options to include); *Leimkuehler v. American United Life Insurance Co.*, 2013 WL 1591450 (7th Cir. 2013) (standing alone, insurer’s act of selecting funds and share classes for inclusion in investment options menu was not a “functional fiduciary” act where provider never exercised right to make substitutions in a way that could give rise to a claim).

¹⁷ The more fundamental issue here is that, if the Department must create “carve outs” from the general advice definition for obviously non-fiduciary activities, then the general definition must be too broad. The Department has itself acknowledged that “[a]lthough the new general definition of investment advice avoids the weaknesses of the current regulation, standing alone it could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships. Accordingly, the proposed regulation includes a number of specific carve-outs to the general definition.” 80 Fed. Reg. 21929. Although the effort was a worthy one, the Department has failed to strike the right balance between curing the perceived weakness of the current definition and respecting Congressional intent.

¹⁸ 80 Fed. Reg. 21941.

1. IRAs and Small Plans should be covered under the Seller's Carve-Out: As proposed, the Seller's Carve-Out only applies to certain plans, and it does not apply to transactions with IRAs or small plans.¹⁹ As the Department knows, millions of working Americans currently do not have access to retirement savings opportunities in their workplace, a problem that is particularly acute for employees of small employers. While most of our group retirement business is focused on serving large plans, we nevertheless believe the Department's Proposals could significantly impede efforts to close the retirement coverage gap. Further, the Department's limits on sales and marketing to new and existing IRA owners will likely significantly increase the risk of "leakage," thereby impairing the retirement readiness of millions of Americans. Precluding providers from reaching out to IRA owners in an efficient and cost-effective way will leave far too many individuals on their own to gather information and materials about their options; as they gather information on their own (if they even try), they will be subject to potentially competing demands to use their savings for non-retirement purposes. Marketing and sales activities serve to educate consumers about their choices and ensure competitive pricing of products and services.

The risk is that some providers and financial professionals may simply withdraw from the IRA and small plan markets rather than attempting to comply with the fiduciary standards (or the onerous conditions of the BIC Exemption) when neither they nor their prospective customer believes a fiduciary relationship exists.²⁰ This would have the adverse effect of reducing competition among financial professionals and simultaneously increasing expenses for IRA owners, plans and participants. In our view, IRA owners and small plans should not be precluded from arm's length bargaining with an investment provider where that provider is not a trusted adviser or undertaking to act for the plan or IRA. Plan fiduciaries are, by law (and without regard to the size of their plans) required to act prudently and in the interest of the plan's participants and beneficiaries. We believe that such a standard imposes an obligation – and not a particularly difficult one – to ascertain the nature of the arrangements in which they are engaged, including distinguishing a sales activity from a fiduciary activity. In the case of IRA owners, they too are capable of distinguishing sales activity and understanding plain English compensation and conflict disclosures. Unlike plan participants, IRA owners have the flexibility – and therefore an inherent protection – to rollover their assets to a competing IRA if and when they become dissatisfied with investments and/or services. The knowledge and understanding of IRA owners should not be discounted by the Department in the absence of an empirical assessment of IRA owners' capabilities and the effects of the Department's regulations on those owners.

For all these reasons, we urge the Department to expand the Seller's Carve-Out to cover plans of any size and IRAs.

2. The Conditions for relying on the Seller's Carve-Out should be modified: We recommend that the Seller's Carve-Out be modified to:

- Eliminate the requirement that the counterparty obtain written representations regarding the capacity in which a plan fiduciary is acting (or regarding plan size and assets, if these

¹⁹ The selection of 100 participants as the threshold for relief appears to have been arbitrary, and we find it unreasonable to believe that a small plan fiduciary is unable to distinguish between a sales pitch and advice from a trusted adviser.

²⁰ We understand that the Department is supportive of efforts in some states to establish state sponsored auto-IRA programs for employees of small employers. We believe that the absence of a carve-out for IRAs, among other factors, would make this type of market unattractive for IRA providers.

limitations are retained) or the fiduciary's understanding that the counterparty is not acting in a fiduciary capacity. Such representations are not, and should not be, part of pre-sales or sales discussions. Starting any relationship with an explanation that the seller is not permitted to discuss product or service offerings until written representations are obtained - to the effect that the plan fiduciary is in a position to act and that the fiduciary is sufficiently sophisticated to understand that the seller is a seller, not a fiduciary - is unnecessarily insulting to a plan fiduciary and/or IRA owner. Despite the Department's perception, albeit unfounded, that no one is really capable of distinguishing sales from fiduciary activities, we believe such confusion has not been an issue of any measurable degree and that this requirement should be eliminated.

- Eliminate putting a counterparty in the position of having to establish or prove that any given plan fiduciary has sufficient expertise to evaluate the transaction and determine the prudence of the transaction with respect to the plan or IRA. We believe that if a plan fiduciary is acting as such in connection with a sales or marketing engagement, it is reasonable for any counterparty to assume that the fiduciary understands its duties under ERISA or the in case of an IRA account owners, their right to act on information they determine to be in their best interest via a rollover. Moreover, the Department provides no guidance on how one could possibly discharge such an obligation with any degree of certainty. If the Department is intent on a test, we strongly suggest that the requirement be reframed to establish a presumption of competence on the part of a plan fiduciary or IRA owner, in the absence of clear evidence indicating otherwise. In this regard, we note that even ERISA fiduciaries – directed trustees – are not required to second guess the competence of a named fiduciary absent extraordinary circumstances.²¹ Surely, a counterparty should not be held to a higher standard than a directed trustee.

- C. The Department should expand the “Platform Carve-Out” and its related “Selection and Monitoring” exception. The Department also should confirm that the Platform Carve-Out is available for investments offered through an annuity contract.

1. The Platform Carve-Out (including the “Selecting and Monitoring” exception) should be available for IRA platforms: The Department has also proposed a carve-out for the marketing and offering of a platform of investments in certain very narrow circumstances. Specifically, offering a platform will not constitute fiduciary advice when the platform of securities or other property is made available to the fiduciary of a participant-directed individual account plan employee benefit plan if: (1) the platform is not individualized to the needs of the plan or participants, and (2) the provider discloses in writing that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity (“Platform Carve-Out”).

The narrow scope of this carve-out ignores the importance of these types of platforms to IRA investors. Prudential, like many service providers, makes available to IRA customers investment platforms that contain a reasonable selection of potential investment options. Prudential informs potential customers of the features of the IRA platform, the limitations on the availability on the platform of certain investment options, and the option (if applicable) of maintaining the balance in the plan or rolling over to any other available IRA product prior to any investment. The IRA owners that elect to invest through the platform have discretion to select from a broad but not infinite menu of asset

²¹ Field Assistance Bulletin 2004-03 (December 17, 2004).

classes and investment alternatives. The mere marketing of a non-individualized menu of investment alternatives and choices for consideration by an IRA owner cannot reasonably be regarded as giving rise to a fiduciary relationship between the platform provider and the individual who is considering the provider. There can be no reasonable expectation on the part of the prospective customer that the platform provider is offering only investments that meet his/her personal needs, or is providing any advice at all beyond merely offering or making a platform available.

Contrary to a number of court rulings, the Department suggests that, but for the proposed Platform Carve-Out, the mere offering of a platform of investment options is fiduciary advice.²² That is particularly problematic because the Department expressly declined to extend the Platform Carve-Out to IRAs, so offering an IRA platform, even one that includes a broad array of investment options, could give rise to an unintended fiduciary relationship under the Proposals. Investment platform providers throughout the retirement industry, who have no interest in or infrastructure to support fiduciary status, will have to reconsider whether continuing to offer these platforms to IRA owners makes sense. If the Proposals are enacted in their current form, it could result in a significant decline in the number and variety of IRA platforms. We urge the Department to avoid this unintended consequence by extending the Platform Carve-Out to IRAs (and all other plans), where (i) the platform provider discloses the characteristics of its IRA platform (*e.g.*, the available asset classes, whether the available options are proprietary, non-proprietary or both, and other limitations on the investments available to the investor), and (ii) after receiving the disclosure, the IRA owner asks to learn more about and/or selects the platform. Implementing such a framework will help ensure that individual retirement investors receive information on the construct of an IRA platform while retaining a robust market of choices and the flexibility to decide which best suits their needs.

DOL declined to extend the Platform Carve-Out to IRAs because “there typically is no separate independent ‘plan fiduciary’ who interacts with the platform provider to protect the interests of the account owners.”²³ We find it extremely difficult to accept that a financial institution cannot offer an investment product, which almost always by necessity includes less than the entire universe of potential investment options to an IRA owner without assuming fiduciary responsibility for that IRA owner’s decision, even if it clearly states, in writing, that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity. The Proposals impose substantial responsibility and liability on financial institutions for the ability to market their products to IRAs. Simply because IRA owners do not have the protection of a fiduciary does not mean that the counterparties who wish to do business with the IRA must assume that role or that the IRA owner believes that the counterparty is assuming such a role.

Prudential also supports extending the “selection and monitoring” Carve-Out to IRAs in order to ensure that providers can, without assuming fiduciary liability, be responsive to an IRA owner’s request for investments meeting specific objective criteria specified by the IRA owner. The fact is that IRA owners can only benefit from information – and the ability to compare products and services – in a competitive marketplace. The Department should be encouraging and facilitating IRA owner access to this information, not, as under the Proposal, creating impediments to affording IRA owners options for enhancing their retirement savings.

²² *Id.* at note 16.

²³ 80 Fed. Reg. 21944.

2. The “Selection and Monitoring” Exception should be available for Sample Line-ups and Platform Sub-sets: Investment platforms made available to plans and IRAs by providers, including Prudential, offer an extensive array of investments. As a result, it is very common for plan fiduciaries and IRA owners to request that the provider describe one or more sample investment fund line-ups or ask that the provider identify a smaller sub-set of its available platform of investments. This may be a sample line-up provided before a new investor makes an initial selection of funds or later when an existing investor wishes to consider replacement investments. In our experience, plan fiduciaries and IRA owners believe that this type of information is useful in narrowing down the available alternatives on which they can focus their review. It is simply not possible for a plan fiduciary or IRA owner to efficiently evaluate thousands of possible investment options on multiple providers’ platforms. Moreover, fiduciaries and IRA owners are accustomed to receiving this information at no cost and reviewing it as part of their evaluation of providers through RFP or similar “search and compare” processes.

Under the Proposals, a provider’s identification of sample fund line-ups or a sub-set of its investment platform could be construed as a fiduciary recommendation. Under the “selection and monitoring” carve-out, the Department has proposed to permit a platform provider to identify investment alternatives that “meet objective criteria specified by the plan fiduciary.”²⁴ We recommend that the Department confirm through an example that the phrase “objective criteria specified by the plan fiduciary” includes a line-up or sub-set based on objective investment-related criteria disclosed to and approved by the requesting fiduciary, including factors such as asset class, investment style and consistency, minimum performance (on both a relative and absolute basis), expense ratios, and peer rankings. In addition, the inability of service providers to provide alternative investment structures or vehicles, including those which may be otherwise not readily accessible to the general investing public (e.g., insurance company separate accounts, stable value options, or collective investment trusts), may exclude these generally lower cost alternatives from consideration when designing an optimal investment menu, ultimately increasing the costs of plan recordkeeping, and diminishing long-term savings to plan participants.

Unless providers can be confident that this type of typical, beneficial and expected exchange will not result in fiduciary status, it is likely that providers will furnish far less information, precluding IRAs and plans from receiving helpful information and making it more difficult for them to manage their investments. Some individuals may be discouraged from establishing IRAs and some employers from offering or maintaining plans. Those IRAs and plans that do continue will incur increased costs if providers effectively are barred from providing customers with anything other than customized line-ups. The result is likely to negatively affect retirement savings for IRA owners and plan participants.

3. The term “platform” should be clarified to include annuity contracts: Prudential, like other insurers, makes investment options available to IRA owners and plan participants through individual and group variable annuity contracts. Investors can allocate their account balances among those different options under the annuity contract.

The Department neither defined the term “platform” nor restricted it to any particular legal structure. We infer that “platform” refers to a mechanism through which an investor can direct investment of his or her account balance among multiple investment choices. We urge the Department to confirm that a variable annuity contract is a “platform” under the carve-out and that in the 403(b)

²⁴80 Fed. Reg. 21958.

market, where an employer may offer annuity contracts of multiple vendors, each insurer's contract is eligible for the carve-out.

D. The Department should expand the "Education Carve-Out."

We commend the Department for recognizing the importance of investment education and programs by including a specific carve-out on education that incorporates portions of Interpretive Bulletin 96-1 ("IB 96-1") ("Education-Carve Out"). However, we are concerned that the benefits the Department sought by including the Education Carve-Out are more than offset by limits the Department has chosen to place on education generally within that carve-out. Prudential strongly believes that the Department should retain IB 96-1 in full, as it has worked well for 19 years, is well understood and has enabled plans and participants to obtain needed information in numerous contexts. The abandonment of IB 96-1 would be very unfortunate and costly for plans and participants.

Investment education plays a critical role in helping employees prepare for retirement, particularly as individuals are increasingly responsible for managing their own retirement savings. Because of the importance of investment education and the demonstrated value of existing programs in improving participant savings and asset allocation behavior, we urge the Department to expand the proposed Education Carve-Out in the ways described below.

1. Asset Allocation Models: Under the Education Carve-Out, the Department proposes to prohibit plan sponsors and service providers from providing asset allocation models that reference the specific investment products available under a plan or IRA. We agree with the Department that this proposal "represents a significant change in the information and materials that may constitute investment education," and we are concerned it will dramatically reduce the value and availability of investment education programs.²⁵

The Department justifies this change based on its belief that "these types of specific asset allocations that identify specific investment alternatives...[c]an effectively steer recipients to particular investments, but without adequate protections against potential abuse."²⁶ However, the Department has not cited nor are we aware of any evidence demonstrating that there has been steering or that any steering, if it occurs, negatively impacts participants.²⁷ The Department recognized the value of IB 96-1 in its 2010 effort to modify the "fiduciary" definition. In that proposal, the Department proposed to preserve IB 96-1 in its entirety and without change. We believe the Department got it right in 2010 and should modify its current proposal to incorporate IB 96-1 in full.

²⁵ 80 Fed. Reg. 21945.

²⁶ *Id.*

²⁷ We are not aware of any understood meaning for the word "steering," but we infer that it would include a provider's arrangement which disproportionately slots the provider's proprietary funds in asset allocation models. Prudential's group retirement business offers asset allocation models, and there is no evidence that abusive slotting occurs. In fact, we recently reviewed the operation of these asset allocation models and learned that on average more than 60% of the funds used by plans under Prudential's asset allocation models were non-proprietary. A recent review also showed that participants in our asset allocation programs (over a four-year period ending in December, 2014) had an average annual account balance growth that was 4.5% greater than participants not in the program.

We believe that the current proposal for the Education Carve-Out, effectively shifts the burden of populating an asset allocation model to plan participants and IRA owners, who, in our experience, either do not have the time to allocate to such activity or may not be sufficiently familiar with investment principles to undertake this activity, thereby eliminating an important tool on which millions of individuals rely for assistance. By employing asset allocation models that refer to specific investments, plan sponsors and service providers are able to illustrate how asset allocation principles can actually be implemented in the participant's own plan or account. This type of specific education and illustrations help individuals connect the dots, and take action that makes for better outcomes for participants and IRA owners. Prohibiting these types of illustrations will only make it more difficult to equip individual investors with the tools they need to make important retirement investing decisions. If a plan is not permitted to present asset allocation models that reference specific funds available under the plan, this may stifle educational conversations or communications about asset allocation. Given the severe consequences of being deemed to have provided investment advice under these circumstances, providers may be forced to withhold references to any specific investments significantly reducing the usefulness of the self-help tools.

In our view, a good way to understand the effect of the Department's proposal for asset allocation models is to contrast the current experience of a 401(k) plan participant whose plan fiduciary has chosen to offer Prudential's asset allocation models with the experience he or she could have if the Department's Proposals are adopted.

- Today, when the employee becomes eligible to participate in the plan, Prudential provides highly informative and reader-friendly materials about a series of asset allocation models. A third party investment professional develops these models, which include up to 13 asset classes and differ based on a participant's risk tolerance and expected years in retirement. The plan fiduciary (typically the employer) determines the number of asset classes to be included (6 to 13) and selects a fund from the list of funds it previously selected for general offering to plan participants. To use the program, the new employee answers three simple questions and is presented with a model that illustrates the allocation across asset classes, with an example of funds associated with each asset class. The employee also may model other strategies for reaching his or her retirement goals, simply by changing the answers to the three questions. The models, therefore, help the new plan participant avoid the common pitfalls of extremely conservative or risky asset allocations or investment in too few funds.²⁸ Far from being "steered" by the models to a limited number of funds or

²⁸ Prudential, like others, believes that these are serious risks. A recent study by Prudential's group retirement business showed that 40% of the group of young (age 29 and younger) actively contributing plan participants who did not use Prudential's asset allocation models had 100% of their account balances invested in stable value or fixed income investments. Conversely, a study by the Employee Benefit Research Institute ("EBRI") suggests that older participants approaching retirement often have excessive exposure to equities. According to EBRI, 40% of the plan participants in its study who were over the age of 60 had 60-100% of their accounts invested in equities, with more than one-fifth (22%) having 80-100% invested in equities. EBRI, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2012" (2013).

In a study of 2012 data, Prudential's group retirement business determined that plan participants of all ages who use Prudential's asset allocation models invested, on average, 70% of their funds in equities while participants not using the models invested at only a 56% rate. Prudential believes that the 56% rate is much lower than the amount many financial professionals recommend as appropriate for most age and risk groups. Prudential has also determined that participants using its models have greater investment diversification across different asset classes

proprietary funds, the participant who chooses a model will invest in a diversified array of funds selected by his or her plan fiduciary.

- Tomorrow, if the Department's Proposals are adopted, this new employee would have no access to practical asset allocation information pertaining to his or her plan. The employee may have access to hypothetical models that show only asset classes and percentages. If the employee is not presented a model that illustrates the allocation across asset classes, with an example of funds associated with each asset class, the models may have little practical value. An employee who is willing to invest significant time may try to identify funds that correspond to the asset classes shown in the model. More likely, the employee will be overwhelmed by the effort and simply not participate in the plan. Alternatively, he or she may incorrectly match investment funds to asset classes and, therefore, undermine one of the cornerstones of successful retirement investing—an appropriate long-term asset allocation.²⁹ While it is theoretically possible that the employee could have access to fiduciary investment advice under the terms of the proposed BIC Exemption or a program based on the Sun America model,³⁰ we believe there are significant questions regarding the feasibility of such approaches.

2. Distribution Education: Under the Proposals, investment advice includes recommendations pertaining to both the taking of a distribution or rollover from a plan or IRA and the investment of the transferred assets. Prudential believes that it is essential that participants understand their distribution options, particularly to avoid hasty and unwise decisions to withdraw their retirement savings in the midst of major life events. We are concerned that the Proposals render many discussions about distributions and rollovers fiduciary in nature, and consequently, adoption of the Proposals will result in a substantial decrease in the amount of critical information available to participants and IRA owners.

Many plan sponsors want their employees and former employees to receive information from a service provider regarding distribution options.³¹ They understand that the decision to take a distribution or roll over one's retirement savings is important and can have a profound impact on a person's financial security in retirement. Unfortunately, many individuals do not have an adequate understanding of the consequences of their alternative courses of action, and they are often tempted to take a distribution when, for example, they lose their jobs. Without access to educational resources, people often make the costly mistake of cashing out their savings. In fact, the Employee Benefit Research Institute recently concluded that the leading cause of "leakage" from the retirement system is participants cashing out their savings upon a separation of service.³² Under the Proposals, it is very unclear at what point discussions and educational materials dealing with rollovers and distributions would be considered fiduciary investment advice, and, as a result, it is difficult to see (given the enormous risks and burdens inherent in being an investment advice fiduciary under the proposed

and funds than those who do not. Participants using the models in 2012 were, on average, invested in 5.9 different funds while those not using the models invested in only 3 funds.

²⁹ *Id.* at note 9.

³⁰ DOL Adv. Op. 2001-09A (December 14, 2001).

³¹ In a review of our plan customers, Prudential determined that approximately 93% of the plan fiduciaries who signed plan recordkeeping services agreements with Prudential agreed to have Prudential provide distribution education services to plan participants.

³² EBRI, "The Largest Leakage Culprit: Job Change Cashouts" (July 17, 2014).

regime) how service providers would be willing to continue providing individuals with vital information about their options and important distribution education topics generally. We do not believe that denying this information to terminating employees will result in their retaining their balances in their plans. We strongly believe that without easy access to information about the pros and cons of the options available to them, participants will make uninformed decisions, negatively impacting their retirement outcomes as a result.

Access to this important information could be preserved if the Department were to expand the Education Carve-Out to cover certain discussions and educational materials related to plan and IRA distributions and rollovers. Specifically, we urge the Department to develop a rollover education safe-harbor applicable to both plans and IRAs that is based upon FINRA Regulatory Notice 13-45 (the "Notice"). The Notice acknowledges that there are many reasons why people may want to roll over their plan assets to an IRA and any recommendation in connection with a rollover should take a holistic view of the individual's circumstances. In particular, the notice explains that any recommendation to roll over to an IRA should reflect consideration of various factors, including the investment options available, fees and expenses, available services, and legal protections and requirements. So long as the factors described in the Notice are fairly presented, discussions about distributions (whether from a plan or an existing IRA) and the investment of assets attributable to a distribution should not be deemed fiduciary advice. Absent such a safe harbor, many service providers will likely be unwilling or unable to engage in important rollover discussions.

In our view, a good way to understand the effect of the Department's proposal is to contrast the current experience of a 401(k) plan participant who is eligible to take a plan distribution as result of terminating employment with what his or her experience could be if the Proposals are adopted. In both examples, the participant participates in a plan which has engaged Prudential's group Retirement business to provide distribution education services.

- Today, the participant receives a letter from Prudential that outlines his or her distribution options under the plan. Like many other plan participants, the former employee reviews the letter and calls Prudential to request a cash distribution. The Prudential representative, a salaried employee, asks the caller about his or her reasons for the distribution and discusses the participant's overall goals for retirement. The Prudential representative then describes the four distribution options and the tax consequences of leaving funds in the plan, rolling assets into a new employer's plan, rolling assets into an IRA, or taking a distribution. Upon request, the Prudential representative will give the caller an estimate of taxes and any early distribution penalty associated with a cash distribution in the amount the caller may be considering. All of this information helps the caller make an informed decision. If a caller requests information on Prudential's rollover options, the representative would provide that information. If a Prudential IRA is opened, a full suitability review is conducted by the representative as part of the application process and is then reviewed and approved by a supervising principal of the firm.
- Tomorrow, if the Department's proposal is adopted in final form, it is unclear how much distribution information Prudential will be able to provide. The ambiguity relating to whether and when providing information becomes fiduciary advice could prompt many service providers in the retirement industry, including Prudential, to cease providing callers with toll-free distribution education services. Rather, providers might decide to simply mail the required Section 402(f) notice, and participants would have to make their own decisions. Without the level of information and support offered today, we believe that more participants will

prematurely tap into (and diminish) their retirement savings by taking cash distributions subject to immediate income tax as well as early distribution penalties.

There are similar concerns when an IRA owner interacts with a financial professional. Below, we contrast the experiences that an IRA owner seeking assistance might have today with what his or her experience could be if the Department's Proposals are adopted as proposed.

- Today, when a financial professional interacts with an IRA owner or potential IRA owner, the professional is able to offer many materials that, in a holistic manner, provide a broad based view of retirement issues and challenges. These challenges include understanding when and how to take distributions from retirement plans, IRAs and non-qualified investments; when Social Security is available; understanding the importance of tax diversification and creating a tax efficient income plan; mitigating the risks of market volatility, inflation and longevity; and determining a sustainable rate of withdrawal. Prudential financial professionals are able to provide educational materials and information to an IRA owner to facilitate the conversation on these topics and many more. The IRA owner can take materials home to review and gain access to websites with more information.
- Tomorrow, if the Department's Proposals are adopted in their current form, it is unclear how much information the Prudential financial professional will be able to provide to the IRA owner without being considered an advice fiduciary. This uncertainty, combined with the severe consequences of fiduciary status (or alternatively, the extremely burdensome requirements of the BIC Exemption), will undoubtedly result in an unwillingness by some financial professionals to provide this type of educational information and will likely increase the cost to the IRA owner or potential owner receiving such information. Yet, investors who rely on a financial professional to help plan for retirement are known to save more than those do not.³³

3. Distribution education and lifetime income options: We commend the Department for permitting a plan provider to provide information to participants on their "retirement income needs" and "forms of lifetime income payment options" as part of the plan information that may be provided under the Education Carve-Out.

Through this and other projects, the Department has recognized that retirement security may be improved by education relating to retirement needs that "extend beyond retirement." It noted that it would amend the Proposals to make clear that general information that helps a participant assess his or her needs into retirement "or explains general methods for the individual to manage those risks both within and outside the plan" will not be fiduciary advice.³⁴

The Proposal itself identifies only three types of annuities as examples of lifetime income payment options. We recommend that Section (b)(6)(i) be revised to add "guaranteed lifetime withdrawal benefits" as an example of this type of distribution options. Absent such a clarification, Prudential believes that the Department's goal, as articulated in earlier initiatives, of providing broad information to participants regarding lifetime income options will be frustrated. We suggest that Section (b)(6)(i) be revised as follows:

³³Planning for Retirement, Terrance K Martin Jr. and Michael Finke, Department of Personal Financial Planning, Texas Tech University, 2012.

³⁴80 Fed. Reg. 21944.

(i) Plan information. Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe ... retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, ~~or~~ incremental purchase of deferred annuity, or guaranteed lifetime withdrawal benefits), advantages, disadvantages and risks of different forms of distributions ...

4. Call Centers: Prudential maintains call centers for its customers, including IRA owners and plan participants. Those individuals may call for information and education about their insurance or investment products, IRA or plan or policy benefits, investment options or distribution options as discussed herein, or to request certain transactions. Most of the calls taken at the call centers relate to routine questions on product features, withdrawals, loans, and routine transactions such as address and direct deposit changes, beneficiary changes, required minimum distributions, and investment changes. Call center staffers provide general information and do not recommend specific investment options nor recommend whether or in what form the caller should take a distribution. We request that the Department confirm that these routine call center activities do not constitute “investment advice” and qualify under the Education Carve-Out so long as any information provided by a call center regarding distribution options or rollovers is provided under a safe harbor that is consistent with FINRA Notice 13-45.

IV. LOW-COST ALTERNATIVE EXEMPTION

Prudential supports a single streamlined exemption that does not inappropriately favor certain types of investments over others. We oppose a separate streamlined exemption that would allow financial professionals to receive otherwise prohibited compensation in connection with advice to invest in certain high-quality low-fee investments, subject to fewer conditions.³⁵

First, we anticipate that a separate exemption for high-quality, low-fee investments would favor passive investment vehicles (e.g., index funds). While valuable investment tools, passive funds are not necessarily the most appropriate investments for all investors or for the entire portfolio of a single investor. Indeed, index funds are “low cost,” because they are “low service.” While some investors may not wish to pay for active management services, we believe along with many others that active management can be an essential part of a diversified portfolio. As shown by a number of academic articles, truly actively managed funds can generate significant value for investors over time.³⁶ In our view, an exemption discouraging such an option is not in the interest of plan participants and IRA owners. In addition, low cost index funds do not address all of the potential needs of a customer such as the protection from downside and longevity risk, which is available through an insurance product.

Second, an approach that provides incentives to financial professionals, through an offer of compliance simplicity and certainty, to consider investments that may not be in the best interest of

³⁵ 80 Fed. Reg. 21964.

³⁶ See, e.g., Petajisto, Antti, “Active Share and Mutual Fund Performance,” *Financial Analysts Journal*, vol. 69, no. 4 (July/Aug. 2013); Jones, Robert C. and Russ Wermers, “Active Management in Mostly Efficient Markets,” *Financial Analysts Journal*, vol. 67, no. 6 (Nov./Dec. 2011); Cremers, Martijn and Antti Petajisto, “How Active Is Your Fund Manager? A New Measure That Predicts Performance,” *Review of Financial Studies*, vol. 22, no. 9 (September 2009).

the investor appears wholly at odds with the stated purposes of the Proposals and more than 40 years of regulatory history. During that time, the Department, to its credit, has refrained from encouraging one investment over another and has recognized that cost cannot and should not be the sole consideration in choosing among service providers, products or investments. One must consider whether the cost is reasonable in relation to the service, product or investment being obtained. Courts interpreting ERISA similarly have not required (or even permitted) a fiduciary to recommend or select investments based solely on cost; instead, they have required a review of quality of services and other factors in addition to cost.³⁷

Third, if the Department were to identify specific “high quality” investments as part of an exemption, it would be difficult to avoid the perception that these designated investments have received the Department’s seal of approval. We are also concerned that any effort to define “high quality” will necessarily be so broad or vague that “cost,” by default, will become the sole factor in making decisions. Of course, it is plan fiduciaries and IRA owners with the help of their financial professionals (not the Department) who should decide which investments are prudent and appropriate for them.

More importantly, there is no reason to believe that there is no (or even less) potential for self-interested recommendations when someone is selling high quality, low-fee investments. A salesperson can sell an index fund that is inappropriate for an individual investor and do so for the purpose of benefiting himself or herself, through commissions or otherwise.

For these reasons, Prudential strongly recommends that the Department not proceed with any high quality, low cost exemption and instead incorporate our suggestions to streamline the general hurdles as we propose below with respect to Prohibited Transaction Exemption 84-24 (“PTE 84-24”) and the BIC Exemption.

V. REVISIONS TO PTE 84-24

Currently, fiduciary recommendations of fixed and variable annuities, insurance contracts and proprietary mutual funds to plans and IRAs, regardless of the size of the investor, may be exempt under PTE 84-24. This exemption has disclosure and reasonable compensation conditions. However, as part of the Proposals the Department proposes to amend this exemption in several ways: (1) it would impose a new “best interest” standard on the advice fiduciary; (2) it would redefine the types of compensation for which relief is available; and (3) the exemption would no longer provide relief for a financial professional’s recommendation of “securities,” including variable annuities, to an IRA customer. As explained further below in our discussion of the BIC Exemption, we do not believe that the establishment of a best interest standard through a prohibited transaction exemption is a viable alternative, primarily because of the significant excise tax liability resulting from an inadvertent failure to satisfy any one of the many conditions of the exemption.

³⁷29 C.F.R. §2550.404a-1(b); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (“[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).”); and *Braden v. WalMart Stores, Inc.*, 588 F.3d 585, 596, n.7 (8th Cir. 2009) (acknowledging that higher fee funds could be chosen for “higher return, lower financial risk, more services offered, or greater management flexibility” and holding that a fiduciary would not breach its duties simply because “cheaper investment alternatives exist in the marketplace”).

Because the proposed regulation is so broad and expansive, the success of the Department's entire endeavor in accomplishing its goals depends on the availability of workable exemptions. These exemptions must appropriately balance the need to act in the customer's best interest with the real risk that those customers will suffer the unintended consequences of limited or no access to certain products, services, and advice. The Proposals do not achieve that balance in their current form. For the reasons set forth below, Prudential urges the Department to reconsider these proposed changes and substantially revise its current approach to exemptive relief set forth in the Proposals.

- A. PTE 84-24 should continue to be the primary exemption for recommendations of mutual funds and all annuity contracts.

The Department proposes to preclude financial professionals from relying on PTE 84-24 for recommendations of "securities" including mutual funds and variable annuities for sales to IRAs. Fixed annuities are unaffected by the Proposals, thus creating a different exemption scheme for these two types of annuities. The Department apparently intends that the BIC Exemption serve as the sole source of relief for variable annuity sales to IRAs. We agree with the Department that fixed annuities do not readily fit into the BIC Exemption's disclosure and other conditions. However, we disagree with the Department's proposed exclusion of variable annuities from PTE 84-24. We believe that all annuities should be treated the same, as they have been for approximately 31 years, because of the insurance benefits and guarantees they provide. They are not the same as pure investment vehicles. The fact that some annuities are regulated as securities in addition to being regulated as insurance products should provide the Department with comfort as to the sales of these products and not require them to be sold under the BIC Exemption rather than PTE 84-24. Also, because the BIC Exemption conditions are significantly more burdensome than the conditions of PTE 84-24, the Department's proposal to prohibit reliance on PTE 84-24 for variable annuity sales has the effect, inappropriately, in our view, of favoring fixed versus variable annuities. Particularly with the addition of the best interest standard to PTE 84-24, Prudential believes that IRA owners will be well-protected when receiving recommendations as to variable annuities from financial professionals relying on PTE 84-24.

We share with other annuity providers the serious concerns regarding the impact of the proposed changes to the definition of advice on our liability and the costs and burden of complying with the BIC Exemption.

- B. The Best Interest Standard should be identical to ERISA's Section 404 duties.

Prudential supports a workable best interest standard that provides consumer protections for IRAs not otherwise subject to ERISA if that standard ensures continued access to the quality products and services IRA owners need for a secure retirement. While we believe that Congress intended for the SEC to consider a fiduciary standard for all retail investment advice, we understand that the Department intends to proceed with its rulemaking. ERISA's fiduciary standards and the "reasonable compensation" condition are concepts that the industry and certain retirement investors are familiar with. The changes we suggest below are designed to facilitate compliance and better align PTE 84-24's conditions with existing law and thereby reduce potential confusion.

Relief under PTE 84-24 would now be conditioned on the financial professional's compliance with a best interest standard. According to the Department, "[t]he best interest standard is defined to effectively mirror the ERISA Section 404 duties of prudence and loyalty, as applied in the context of

fiduciary investment advice.”³⁸ Apparently, the Department added this condition to extend ERISA-type duties to IRA financial professionals, who are not subject to Section 404, rather than to create new duties for plan fiduciaries.³⁹

However, because the proposed condition applies to financial professionals for both plans and IRAs and the operative language purports to restate rather than expressly incorporate the Section 404 duties, the Department risks creating for plans and IRAs a new and independent standard as part of the revised exemption. Rather than create yet another fiduciary standard that would have to be interpreted anew by federal and state courts, we urge the Department to provide much needed certainty to financial professionals and their customers by expressly incorporating into the best interest standard the existing, well-developed fiduciary standard under ERISA Section 404. This would ensure that, as intended by the Department, this condition would in fact be “interpreted in light of forty years of judicial experience with ERISA’s fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts.”⁴⁰

Therefore, we urge the Department to modify the best interest standard in PTE 84-24 (and the BIC Exemption) as follows so that it is identical to the ERISA Section 404 duties:

... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, ~~without regard to the financial or other interests of the fiduciary, any affiliate or other party and~~ (ii) solely in the interest of the plan or IRA, in each case as such standards have been interpreted under ERISA Section 404.⁴¹

- C. PTE 84-24 should be revised to provide complete relief for the insurer relying on the exemption to provide investment advice.

PTE 84-24 exempts “[t]he effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.” We and others in the industry have understood that section to provide relief for any conflict of interest the insurer might have in connection with the sale of an insurance contract or mutual fund, including its receipt of revenue sharing and investment management fees. The Department has not proposed to amend this section of PTE 84-24. However, the proposed changes to the definitions of “Insurance Commission” and “Mutual Fund Commission” call into question whether the Department views such forms of compensation as permissible under PTE 84-24.⁴² When an insurance company sells an annuity, it receives consideration

³⁸ 80 Fed. Reg. 21970.

³⁹ *Id.*

⁴⁰ 80 Fed. Reg. 21970.

⁴¹ For consistency, a similar change should also be made to the language in Sections II(c)(1) and VIII(d) of the BIC Exemption.

⁴² The proposed changes to PTE 84-24 define “Insurance Commission” as “a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers.” However, the definition specifically excludes “revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates.” Similarly, the definition of “Mutual Fund Commission” includes a “commission or sales load paid either by the plan or the investment company for the

for the initial purchase of the product. Thereafter, the product itself may generate one or more ongoing forms of compensation to the insurer including: (1) the spread between the guaranteed return or payments under the contract and the insurer's general account earnings; (2) fees and charges assessed under the product; (3) payments from separate account investment providers (e.g., mutual fund revenue sharing) for services; and (4) if the contract includes proprietary investments, the insurer or an affiliate will receive a management fee.

We ask that the Department confirm that an insurance company or mutual fund underwriter may continue to receive those third party payments in connection with the sale of their annuities and mutual funds under Section I(a)(3), notwithstanding the revised definition of "Insurance Commission" and "Mutual Fund Commission" so that insurers may continue to offer annuities and mutual funds at competitive prices. To do otherwise would call into question a fundamental part of the industry, which the Department, in its 408(b)(2) regulations, has acknowledged as permissible, if disclosed.

Further, we also see no reason why compensation arrangements for employees of an insurance company and "career" agents who market the insurer's annuity contracts, including payments as salary and bonuses, overtime pay, and retirement, medical and other welfare benefits should not be covered as Insurance Commissions. These arrangements are designed to compensate employees and career agents in the same way that traditional commissions do.

VI. BEST INTEREST CONTRACT EXEMPTION

A. Introduction

As we have previously noted, we support the establishment of a workable best interest standard that both protects consumers while ensuring their continued access to various products, services, and advice. We do not believe that the establishment of such a standard through a prohibited transaction exemption is a viable alternative, primarily because of the significant excise tax liability resulting from an inadvertent failure to satisfy any one of the many conditions of the exemption. In the Proposals, it is, in particular, the BIC Exemption that presents the most significant compliance challenges and expected costs, including seemingly punitive standards, and potentially significant unintended consequences. Those unintended consequences may deprive or limit access to necessary products and services by IRA owners and plan participants. We have serious concerns about the far-reaching impact of the Department's extension of fiduciary status and the costs and burden of complying with the BIC Exemption to avoid violations of ERISA when acting in these newly created fiduciary roles. As such, it behooves the Department to take those considerations into account by making significant changes to the BIC Exemption to make sure that investors are not unintentionally harmed by the proposed changes. This potential harm would run counter to the Administration's position in support of robust retirement education and planning as well as access to and utilization of guaranteed lifetime income products by retirement savers.

service of effecting or executing the purchase or sale of investment company shares," but specifically excludes "a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee."

B. The definition of Assets should be expanded.

The BIC Exemption permits Advisers and Financial Institutions to receive compensation for services provided in connection with advice as to “a purchase, sale or holding of an Asset” by a retirement investor. Thus, how one defines Asset is central to the scope of this Exemption.

In identifying investment transactions to be covered by the BIC Exemption, the Department should avoid creating a “legal list” of permissible investments. Congress and the Department have consistently refrained from second guessing the investment choices and needs of plans and IRAs. Yet, given the broad scope of the Proposals, the Department will effectively be establishing a “legal list” for small plans and IRAs. The Department should continue to defer to the IRA holders and the plan fiduciaries (already subject to ERISA’s high standard of care) to make their own judgments about the types of investment products and services appropriate for their plans or accounts, after performing their own due diligence. While some investors may not be interested in alternatives, such as real estate, these options may be appropriate for other investors. Moreover, the BIC Exemption does not explicitly address existing advice programs that are offered to IRAs and plans, such as wrap fee programs, under which Advisers identify, based on the customer’s express risk profile, affiliated and unaffiliated mutual funds and/or discretionary investment managers for selection by the customer.

A Department-sanctioned list of permissible investment vehicles or instruments may effectively hamstring the Adviser in rendering advice based on the customer’s individual needs and risk tolerances. The Department’s “legal list” will discourage them from obtaining that assistance. Because the Adviser will be subject to the best interest standard, we believe that it is unnecessary to limit the type of assets that may be purchased under the BIC Exemption. Further, as the universe of available investment types evolves over time, a finite list would preclude potentially new investments from being included. For these reasons, we recommend that the Section VII(c) Exemption be modified as follows:

An “Asset,” for purposes of this exemption, includes any security or other property or asset, including an investment services contract or arrangement. ~~only the following investment products: bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 23.1-5 that are excluded from securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.~~

C. The impartial conduct standards should be identical to ERISA’s current standards.

For the reasons we discussed in the PTE 84-24 Section above, we believe that the best interest standard under the BIC Exemption should be identical to ERISA’s Section 404(a) duties of prudence and loyalty and that the Department should revise the Sections II(c)(1) and VIII(d) as previously identified herein.

The Department has indicated that an Adviser's or Financial Institution's failure to satisfy the best interest standard will result in the loss of relief under the Exemption, and therefore liability under ERISA and/or the Code for a prohibited transaction.⁴³ Compliance with the best interest standard should not, itself, be a condition for exemptive relief as this standard is not completely objective. Conditioning exemptive relief on compliance with this standard will create uncertainty and exposure to significant excise tax penalties on Advisers, even when the recommendation results in no loss or harm to the retirement investor. This could be the case if, for example, the Adviser recommends a product for the purpose of benefitting itself but that product happens to perform very well.

Prudential appreciates the need for and supports a "reasonable compensation" condition under the Exemption. As with the best interest standard, however, Prudential suggests that the Department leverage existing rules. Rather than create a new standard that will require explication in the courts and Department enforcement actions, we recommend that the Department adopt the ERISA Section 408(b)(2) standard, which would permit the industry to leverage existing business and compliance practices currently used to comply with the 408(b)(2) regulations. Prudential, therefore, proposes the following modification of Section II(c)(2):

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed reasonable compensation within the contemplation of Section 408(b)(2) and 408(c) of ERISA and Code Sections 4975(d)(2) and 4975(d)(10) in relation to the total services they provide to the Retirement Investor; and

As indicated, we recommend that the language "in relation to the total services" be struck because it is unnecessary and, at worst, confusing. In some and perhaps most cases, the Adviser and/or Financial Institution may be providing an investment product instead of or in addition to "services." Insurance guarantees are not services but are nonetheless valuable and reflected in the cost of annuity products. It should be sufficient that the total consideration received in connection with the transaction is reasonable.

D. The contract timing and consent process should be more flexible.

The BIC Exemption requires that the customer enter into a tri-party contract with the Financial Institution and the Adviser before any investment advice is provided to the customer. Prudential recommends certain modifications to better reflect the typical interactions between customers and the Adviser/Financial Institution and to avoid a chilling effect on the establishment of those relationships. Most advisory sales processes involve an Adviser gathering a significant amount of information about the customer so that the Adviser may make a determination as to the insurance and financial needs of the customer and, for any securities investment, make a recommendation that is suitable. This interaction is naturally dynamic. We anticipate that interjecting into this process a requirement that the customer sign a contract before he or she understands the nature or the relationship or has even

⁴³ 80 Fed. Reg. 21969 ("In addition, failure to satisfy the Impartial Conduct Standards will result in loss of the exemption.").

expressed an interest in proceeding will be off-putting at best and more likely intimidating to the point of that individual declining to take any action.

Prudential believes the Department could more effectively further its goals of mitigating conflicts of interest while maintaining investor access to investment advice if it makes the following modifications to the contract requirement:

1. The contract need not be entered into prior to the recommendation that is the subject of the Exemption but should be entered into before or simultaneous with the execution of the recommended transaction.
2. The Exemption should not be conditioned on execution of the contract by all or any of the parties. Instead, other reasonable means of establishing the requisite mutual agreement should be permitted, including an “implied consent” process, provided that (1) the contract is presented in advance of or in conjunction with the recommendation, (2) the obligations of the Adviser and Financial Institution described in the contract are enforceable (and the Adviser and Financial Institution agree in the contract that they will not assert a defense to a claim under the contract by the retirement investor based upon the retirement investor’s failure to sign the contract); and (3) no contract for which the retirement investor has “negatively consented” may impose any obligations on the retirement investor.

We believe that these alternative methods of obtaining the required contract will be less intimidating to the retirement investor while still achieving the objective of making information available. For example, an Adviser may provide a website address that is sufficiently specific to provide customers with access to the contract (along with a declaration that the provider agrees to be bound by the contract in providing any recommendations to the customer). Upon request, and without charge, the Financial Institution should be required to provide a paper copy of the contract to the customer.

3. The retirement investor will be deemed to have consented to the contract if after receiving the contract or notice thereof, the retirement investor executes, or directs or consents to the execution of, the recommended transaction.

To address these issues, we propose that Section II(a) of the BIC Exemption be amended as follows:

~~Contract. Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset~~ Prior to the execution of the transaction subject to relief under Section I, the Adviser and Financial Institution enters into a written contract or other legally binding commitment with the Retirement Investor that incorporates the terms required by Section II(b) – (e). An agreement shall not fail to satisfy this provision solely because the agreement is not physically signed by any or all of the parties, provided that (i) the agreement is either presented to the Retirement Investor or a notice is presented to the Retirement Investor identifying a website on which the agreement is posted and stating that the Adviser and Financial Institution agree to be bound by its terms in providing any recommendations to the Retirement Investor and (ii), after receiving the agreement or the notice, the Investor executes, or directs or consents to the execution of, the recommended transaction.

- E. The BIC Exemption should reflect the roles of the parties in various marketing arrangements.

In some cases, a product manufacturer (e.g., a mutual fund company or an insurer that issues a variable product such as an annuity) may market its products through third parties (e.g., broker-dealers or insurance agents). In these cases, the third party (and not the product provider) is potentially the fiduciary adviser. We request that the Department explicitly recognize the distinct roles of a product manufacturer and a separate legal entity (whether affiliated or unaffiliated with the manufacturer) that has the relationship with the retail retirement investor and whose employee (or registered representative) conducts the actual sale. Prudential requests that the Department explicitly confirm that, where the manufacturer does not itself act as an advice fiduciary (e.g., through direct communications with the investor), the manufacturer will not be deemed an investment advice fiduciary or have liability merely because the Adviser is appointed as an agent by the product manufacturer⁴⁴ and such Adviser acts in a manner that results in the Adviser becoming a fiduciary and the Adviser fails to comply with the terms of the BIC Exemption.⁴⁵

In addition, if a product manufacturer (who does not employ or otherwise control the Adviser) is considered a Financial Institution under the BIC Exemption, we suggest that the manufacturer's obligations under the BIC Exemption and its related contract reflect its limited role. For example, the Financial Institution should not be required to represent that *it* is a fiduciary or that *it* will comply with Impartial Conduct standards *as to investment recommendations provided by a non-employee Adviser*. Specifically, Section II(b) should be revised as follows:

(b) *Fiduciary*. The written contract affirmatively states that the Adviser and/or Financial Institution, as applicable, is a fiduciary under ERISA or the Code, or both, with respect to any investment recommendations to the Retirement Investor.

As to the warranties in Section IV(d) of the proposed Exemption, the Financial Institution's warranty should be limited to those activities within its control. See our proposed revisions to the warranties set forth below.

- F. The Section II(d) warranties should be revised.

1. Section II(d) requires that certain warranties be included in the contract. Prudential appreciates that these warranties are, like the proposed best interest standard, designed primarily to protect IRA investors who do not have the benefit of ERISA's fiduciary standards; however, we urge the Department to strike a balance that takes into account the costs to the industry (and ultimately retirement investors) of this approach. To this end, we recommend that the warranties be revised as follows to help reduce the substantial and unduly burdensome costs associated with the BIC Exemption while still providing investors with the protections they need:

- The Adviser and Financial Institution are required to warrant that they will comply with federal and state law. We appreciate the Department's clarification in the preamble that a

⁴⁴ Under state insurance laws, among other requirements, an agent must be "appointed" as an agent by an insurance company to sell its products.

⁴⁵ We note that the same issue also arises under the proposed regulations.

breach of this or the other warranties would not constitute a failure to satisfy the Exemption's warranty condition resulting in a loss of exemptive relief.⁴⁶ We request, however, that the Department explicitly provide for this result in the Exemption itself. See below our proposed revision below.

- Section II(d)(4) describes the most problematic of the warranties. It would require the Adviser to warrant that neither the Financial Institution nor an Affiliate or Related Entity "uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." Although the Department has stated that the Exemption is designed to preserve "common fee practices" following the expansion of the fiduciary definition and has asserted that this warranty "does not mandate fee leveling", the proposed Exemption effectively does just that.⁴⁷ At the least, this "incentive compensation" warranty introduces a subjective standard that will potentially drive Financial Institutions to level fees. More likely, it also will have other consequences, including forcing changes in recruitment policies and inviting a rash of plaintiffs' class action lawsuits asserting that current fee practices "tend to encourage" disloyal behavior. Worse yet for our customers would be the exodus of some, perhaps many, Advisers from the retirement segment of the market as they decline to accept the increased compliance costs and litigation risk in assisting retirement investors. Prudential believes that robust competition among companies and financial professionals is ideal for our customers. The hardest hit, of course, would be the smaller plan and IRA market, the very investors the Department is trying to assist.
- Under Section II(d)(2), the Financial Institution must warrant that it has adopted written policies and procedures reasonably designed to mitigate material conflicts of interest and ensure that its Advisers adhere to the impartial conduct standards. Even though relief under the BIC Exemption is not conditioned on compliance with the warranty, the inclusion of the warranty obviously (and apparently intentionally) subjects the Financial Institution to potentially crippling litigation over the meaning of "designed to mitigate." We request that this condition be revised such that the Financial Institution will be deemed to have complied if its policies and procedures satisfy similar requirements under U.S. securities laws. Section 15(b)(4)(E) of the Securities Exchange Act, and Section 203(e)(6) of the Investment Advisers Act, for instance, each describe the steps necessary to mitigate conflicts of interest. Importantly, this will reduce the substantial cost of complying with the Exemption as the industry already has these robust compliance policies in place.
- The third warranty, in Section II(d)(3), provides that, in formulating its conflict policies, the Financial Institution has "specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the

⁴⁶ 80 Fed. Reg. 21970.

⁴⁷ 80 Fed. Reg. 21971. "The exemption permits fiduciaries to continue to receive a wide variety of types of compensation that would otherwise be prohibited. It seeks to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers." 80 Fed. Reg. 21966.

Impartial Conduct Standards.” Prudential believes that this warranty is unnecessary. The Financial Institution will have already warranted, that it maintains procedures designed to mitigate the impact of material conflicts on the Adviser’s compliance with the impartial conduct standards. It is unlikely that written policies and procedures could be “reasonably designed to mitigate” conflicts of interest yet not have “specifically identified” those conflicts in their formulation. In other words, a fair reading of Section II(d)(2) would implicitly include, at least to a material extent, the terms of Section II(d)(3). For these reasons, Prudential asks the Department to delete Section II(d)(3) of the Exemption in the final rule.

2. Suggested language for the warranty provisions: As discussed above, we encourage the Department to revise Section II(d) of the Exemption to adopt a simpler yet effective approach to encouraging effective conflict mitigation as follows:

Warranties. The Adviser and Financial Institution affirmatively warrant the following, provided that compliance with such warranty shall not be a condition of the relief provided hereunder:

(1) To the extent it provides investment advice to a Retirement Investor, t~~The~~ Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws regarding the rendering of investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset;

(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest of the Adviser in the recommendation of the Financial Institution’s products and services and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c) in recommending the Financial Institution’s products and services. Such policies and procedures shall be deemed sufficient if they comply with Section 15(b)(4)(E) of the Securities Exchange Act, and Section 203(e)(6) of the Investment Advisers Act, as applicable;

(3) [deleted]

(4) ~~The use by Neither the Financial Institution, or nor (to the best of its knowledge) any Affiliate, or Related Entity of uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage has not caused nor will cause the individual Advisers to make recommendations of the Financial Institution’s products or services that are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).~~

G. The “broad range of investments” provision should be simplified.

1. Written Finding: The written finding requirement in Section IV(b)(1) places a substantial burden on Financial Institutions without a corresponding benefit to the retirement investor. The volume of programs offered by large Financial Institutions renders a special written finding impracticable. We recommend that this condition be revised as follows:

(1) ~~The Financial Institution makes a specific written finding that~~ the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser from providing advice that is in the Best Interest of the Retirement Investor...

2. Compensation: We believe that the compensation requirement in Section IV(b)(2) should be deleted because it reflects a radical departure from the longstanding rule for determining the reasonableness of compensation that includes revenue sharing. The Department acknowledges that this requirement “is more specific than the reasonable compensation requirement set forth in the contract under Section II because of the limitation placed by the Financial Institution on the investments available for Adviser recommendation. The Department intends to ensure that such additional payments received in connection with the advice are for specific services to Retirement Investors.”⁴⁸ This requirement represents a new and difficult to define standard for evaluating the reasonableness of compensation in arrangements involving third party payments, such as revenue sharing.

Revenue sharing and other third party payments are seldom if ever paid in exchange for specific services provided to a plan or IRA. They generally represent the variable product and mutual fund industry’s recognition that retail broker-dealers and retirement services providers expect to be compensated for offering their products. In the case of retirement services providers, as the Department is well aware, it is generally not market practice for retirement plan sponsors to wish to pay the full cost of the services they receive and to prefer, indeed insist, that the retirement provider of plan recordkeeping and administrative services be paid, at least in part, through revenue sharing and other third party payments. These practices are widespread if not universal.

The fact that these payments are not made in relation to specific services for specific plans does not render these payments illegal or even inappropriate. Instead, as the Department has consistently recognized for almost 20 years, fiduciaries must confirm that these payments, when aggregated with other compensation received by the provider, are reasonable in light of the total services provided to the plan. In the Department’s own words -

Under Section 404(a)(1) of ERISA, the responsible Plan fiduciaries must act prudently and solely in the interest of the Plan participants and beneficiaries both in deciding whether to enter into, or continue, the above-described arrangement and trustee agreement with [provider], and in determining which investment options to utilize or make available to Plan participants or beneficiaries. In this regard, the responsible Plan fiduciaries must assure that the compensation paid directly or indirectly by the Plan to [provider] is reasonable, taking into account the trustee services provided to the Plan as well as any other fees or compensation received by [provider] in connection with the investment of Plan assets. In this connection, it is the view of the Department that the responsible Plan fiduciaries must obtain sufficient information regarding

⁴⁸ 80 Fed. Reg. 21976.

any fees or other compensation that [provider] receives with respect to the Plan's investments in each mutual fund to make an informed decision whether [provider's] compensation for services is no more than reasonable.⁴⁹

3. Disclosure of Limitations: Section IV(b)(3) requires that, before making an investment recommendation, the Adviser provides written notice of the limitations placed on the Assets that the Adviser may offer. Prudential suggests that this notice also include a description of the key features of its platform or offering. For example -

(3) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of key features, including (i) the number and types of available asset classes, the number of options in each asset class, whether the funds are a mix of proprietary and non-proprietary or solely proprietary, (ii) the fact that investment platforms may also be available from different Financial Institutions with different product offerings; and (iii) the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA...

This additional information would give the customer a basis on which to determine whether the Adviser's "limited" range of investment offerings would be adequate for the customer's objectives. We note that virtually all investment programs or platforms are "limited" in some manner. Thus, it is important that the customer understand the nature of those limitations.

4. Notification to Customer: Section IV(b)(4) would require the Adviser to notify the retirement investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the retirement investor's needs. Prudential believes that this notification is unnecessary. As a result of the pre-recommendation disclosure required by Section IV(b)(3) (if revised as recommended above), the customer will already have been made aware of the limitations of the Adviser's offering and will be able to make his or her own judgment regarding the adequacy of that offering for his or her needs.

H. The proposed disclosures to the retirement investor are unnecessary or overbroad.

1. Transaction Disclosure: The BIC Exemption's point-of-sale transaction disclosure requires a chart that illustrates the "all-in" cost and anticipated future costs over a 1, 5 and 10 year period of a recommended Asset, based on reasonable investment return assumptions. While Prudential recognizes the importance of arming customers with sufficient information about the products and services available to them, we believe that the proposed point-of-sale disclosure, as required under Section III(a) of the BIC Exemption, is both unduly burdensome and unlikely to facilitate greater understanding of the products and services by the retirement investor.

Instead, we suggest that the Department modify the point-of-sale disclosure requirement to leverage the substantial experience with the existing Section 408(b)(2) disclosure. Benefit plan investors and participants would receive disclosures of direct and indirect compensation pursuant to Section 408(b)(2) and IRA investors would receive disclosures similar to those disclosures. We believe that it would help IRA investors to receive such disclosures, and it would not help them to receive the much

⁴⁹ DOL Adv. Op. 97-15A (May 22, 1997). See also DOL Adv. Op. 97-16A and DOL Adv. Op. 2013-03 (July 3, 2013).

more voluminous and difficult-to-interpret information proposed in the BIC Exemption. This approach also leverages the substantial amount of time, money and resources the industry has already invested in the development and implementation of systems, processes, and compliance controls to comply with Section 408(b)(2).⁵⁰

We believe that the “Total Cost” chart, as proposed by the Department, is unlikely to provide information useful enough to the retirement investor to justify the significant expense to the Financial Institution of generating it. And, generating return assumptions for all of the investments that a Financial Institution may make available is impracticable. Indeed, providing “reasonable assumptions” about an investment’s future performance may well conflict with FINRA rules prohibiting predictions or projections of future performance. If the Department believes that investors will benefit from a chart that projects costs in future periods, we suggest a chart that is based on and consistent with the mutual fund and variable annuity prospectus disclosure model required by securities laws. This chart would present a hypothetical investment in a uniform amount (e.g., \$10,000) and apply a uniform rate of return assumption for all types of investments. The SEC chose 5% for the mutual fund fee table. Even with the uniform return assumption, investment costs may be compared across competing funds.

2. Annual Disclosure: The Department also proposes that an annual disclosure be provided to each retirement investor. The disclosure would include (1) the Assets purchased or sold during the past year, (2) the total amount of fees or expenses paid by the retirement investor on each Asset, and (3) the compensation received by the Financial Institution and Adviser for each Asset. The Department stated that disclosure “is intended to show the retirement investor the impact of the cost of the Adviser’s advice on the investments by the plan, participant or beneficiary account, or IRA”⁵¹ and asks whether this disclosure is necessary in light of the point-of-sale disclosure.

Prudential believes that there are no additional benefits to providing this disclosure to the retirement investor. The retirement investor would have already received the relevant fee information at the point-of-sale and would have then evaluated any potential conflicts of interest. Additionally, it is at the point-of-sale when the information is needed. Further, contemporaneous transaction-specific information will be provided through the transaction confirmations required for registered investment products.⁵² This is the best way to see the impact of costs on plan transactions. It is not necessary to redistribute fee and cost information on an annual basis unless that information has changed.⁵³ In addition, we believe there is a meaningful risk that retirement investors will find repeated disclosures to be overwhelming, misleading and, at the least, a nuisance, and at worst, serve as a catalyst for taking actions not in the best interest of the retirement investor. For example, a retirement investor who receives annual disclosures (other than account statements) may be prompted by the disclosure information to sell his or her investments without taking into account the benefits associated with the existing product that were purchased to meet the financial needs of the investor.

We ask the Department to strike the appropriate balance between keeping participants informed and imposing unnecessary and unduly burdensome costs on those who endeavor to provide cost-

⁵⁰ The Department has not provided any explanation as to why these comprehensive disclosures would be inadequate.

⁵¹ 80 Fed. Reg. 21975.

⁵² 17 C.F.R. §240.10b-10.

⁵³ Prudential does agree that, to the extent there is a material change in the contract information pertaining to services, fees and conflicts, the Adviser or Financial institution should be required to notify the retirement investor of the changes, at least annually.

effective services to them. For the Adviser and Financial Institution, developing a detailed accounting of the costs associated with each Asset for each retirement investor, if even possible, will significantly increase their servicing expenses, which could result in a reduction in the number of Advisers willing to provide these important services and/or increased fees to customers. Again, Prudential believes that customers benefit from a wide range of choices in advice providers.

3. Website Disclosure: In addition to the point-of-sale and annual disclosures, the BIC Exemption requires disclosure on a public website of direct and indirect material compensation received by the Adviser and Financial Institution for services in connection with each Asset that a retirement investor is able to purchase, sell or hold, or actually did purchase, sell or hold within the last 365 days, as well as the source of that compensation. Like the annual disclosure requirement, we believe that the website disclosure is unlikely to provide any meaningful information to retirement investors, while requiring potentially significant investment in time, resources and explicit development costs by the retirement industry.

First, it is simply not possible to generate the compensation information that the Department proposes to include on the website. Apparently, this condition requires website disclosure of the compensation received by the Adviser and Institution *by Asset*. However, with respect to compensation for managing an account, most of the industry does not price services by Asset. Instead, pricing is based on the *services* arrangement with the customer which can vary depending on the type of customer. As a very simple example, an Adviser is unlikely to receive the same rate of compensation for managing the assets of a customer with a small account as it does for a very large account, yet these customers may invest in the same assets. Also, to the extent this provision is intended to capture all revenue sharing for all mutual funds available on a retirement services provider's platform, those fees can vary by fund or share class and over time, all within ranges determined by competitive industry market forces. For this reason, this website disclosure will not serve its intended purpose - to provide a "broad base" of pricing information and compensation structures that can be "used by financial information companies to analyze and provide information comparing the practices of different Advisers and Financial Institutions."⁵⁴ Given the myriad ways in which advisory services are provided and priced, it is simply not possible to perform the industry-wide comparison the Department envisions.

Moreover, even if the data were accessible in a meaningful format, the cost of populating and maintaining this website describing potentially thousands of Assets would be a serious disincentive to relying on the Exemption. In our view, the Section 408(b)(2) disclosures (and similar point-of-sale disclosures for IRAs), supplemented by routine disclosures already provided to investors (such as confirmations, account statements, and prospectuses) are sufficient to inform retirement investors about investment fees and expenses. Customers interested in comparing the advisory services available from different providers can use these point-of-sale disclosures to evaluate the *actual* compensation that they could expect to pay to each of the particular providers.

The Proposal also requires that the web information be provided in a "machine readable format." If this information is publicly available, we have no doubt that service providers in the retirement industry will be subjected to frivolous but nonetheless expensive lawsuits that have nothing to do with protecting the interests of retirement investors. In our view, it is inappropriate as a matter of public policy for the Department to compel the industry that it is charged with regulating to make public disclosures so that class action attorneys, rather than the Department, can more easily enforce its

⁵⁴ 80 Fed. Reg. 21973.

regulations. We believe that retirement investors are currently able to effectively address their issues and redress any harm through numerous federal and state laws, enforced by the appropriate authorities, and that providing this type of public data will principally benefit third-parties. Moreover, increased litigation costs (as well as increased compliance costs) will inevitably be reflected in industry pricing, further disadvantaging retirement investors.

4. Contract Disclosure: Section II(e)(3) would require that the contract itself disclose whether the Financial Institution offers Proprietary Products or receives Third Party Payments and the website address that discloses the Adviser's and Financial Institution's compensation arrangements. Because we have recommended that the website disclosure be eliminated and the Section 408(b)(2)-like transaction disclosures we have recommended would address these payments, we suggest that this condition be deleted.

- I. The EBSA notice and data request provisions are unnecessary and burdensome and the recordkeeping requirements should be clarified.

1. EBSA Notice: Section V(a) would require a Financial Institution to notify the Department of its intent to rely on the BIC Exemption. This would appear to be a one-time notice that could cover all of the Financial Institution's products and services. Yet, the requirement will create another "foot fault" by those attempting to satisfy the terms of this complicated Exemption. For example, will a Financial Institution be required to file a separate Notice for every legal entity, or will it need to revise its Notice when it restructures its operations? We request that the Department delete this requirement or further explain its purpose. This notice will not be useful for retirement investors, and it is not clear how this one-time filing (that virtually all Advisers and Financial Institutions will make) will be useful to the Department.

If the Department does retain this filing requirement, we request that the Department clarify that the relief provided by the BIC Exemption will not be lost solely because of a failure to file the Notice:

(a) *EBSA Disclosure*. Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA. A failure to file the required notice shall not result in loss of the exemption provided that the Financial Institution files the notice within a reasonable time following discovery of such failure.

2. Data Request under Section IX: Prudential asks the Department to delete Section IX of the Exemption relating to Data Requests.

While this Section describes the obligation of a Financial Institution to provide certain information to the Department on request, it is fundamentally an additional recordkeeping requirement. Section V(b) already requires the Financial Institution to maintain the records necessary to demonstrate compliance with the Exemption. If a Financial Institution does not maintain the information identified in Section IX in the ordinary course in an accessible format, as will be likely at least in some cases, it must create the databases and software in order to do so, well in advance of a DOL request.

The breadth of information required to be maintained in a specific format will present a significant challenge without corresponding benefits to the Department or retirement investors. While the shortness of the comment period prevents Prudential from developing precise cost estimates, it is clear to us that the cost of creating this document system will far exceed those estimated by the Department.

Financial Institutions are already required to maintain records necessary to demonstrate their compliance with the conditions of the BIC Exemption. It is difficult to see how the Section IX data request provision will further assist the Department in “assessing the effectiveness” of the exemption.⁵⁵ It is unlikely that the Department could assess the effect of the Exemption’s conflict mitigation requirements, the core of the Exemption, on advice provided to plans and IRAs by reviewing aggregated inflow, outflow, holdings and revenue data by Asset. And, given the Department’s relatively modest enforcement resources, we would not expect it to be making many of these requests (and evaluating the raw data provided in the response to the requests), yet every Financial Institution would be required to develop the systems and maintain the data in case of such an unlikely request.

Section IX(e) also could have the unintended consequence of increasing the distribution of misleading information. It would permit the Department to disclose to the public the returns of retirement investors aggregated at the Adviser level. First, it is difficult to see how this information would have *any* utility unless the Department actually calculated returns for the retirement investors from the data elements required in Section IX(d). If it did, the Department would presumably then “aggregate” or average those returns by Adviser, ostensibly to show the average return generated by an Adviser for retirement investors. This is a seriously flawed approach. Any single Adviser is likely to have a range of customers, each with unique objectives and risk/return profiles and an Adviser may recommend to a single retirement investor the products of multiple Financial Institutions. It would be fundamentally misleading to publish as the average return produced by an Adviser that is based on data provided by a single Financial Institution relating to retirement investors with such diverse objectives. It may be unsatisfying to consider, but investment advisory services are not commodities and it is simply not possible to benchmark the effectiveness of those services in the manner the Department proposes.

J. The Department should adopt a “good faith compliance” standard under the BIC Exemption.

Prudential believes that the BIC Exemption should incorporate a good faith compliance concept. Financial institutions and professionals should be able to rely on the Exemption provided that they act in good faith and with reasonable diligence in their compliance efforts and correct any errors within reasonable time periods after detection. Given the proposed breadth of the Exemption’s conditions and the extensive disclosure and recordkeeping requirements, as well as the very short time frame for implementation, a good faith compliance standard, coupled with the ability to cure defects upon knowledge of those defects, is essential. The Department has adopted a good faith compliance standard in other contexts, including the recently finalized service provider exemption and participant disclosure regulation, and the insurance company general account regulation.⁵⁶ It is appropriate for the Department to acknowledge the operational challenges presented by the BIC Exemption’s disclosure, contract and other requirements and adopt a good faith compliance approach.

⁵⁵ 80 Fed. Reg. 21976.

⁵⁶ 29 C.F.R. §2550.408b-2(c)(1)(iv)(F)(2), 29 C.F.R. §2550.408b-2(c)(1)(vii), 29 C.F.R. §2550.404a-5(b)(1), and 29 C.F.R. § 2550.401c-1(i)(5).

- K. The Department should ensure that the confidential and proprietary information of Financial Institutions and Advisers is respected.

We ask that the Department carefully consider the impact of any public disclosure requirements on the legitimate interests of Financial Institutions in preserving the confidentiality of their proprietary information and trade secrets, and upholding contractual confidentiality with investment partners.⁵⁷

VII. INSURANCE AND ANNUITY CONTRACT EXEMPTION UNDER THE BIC EXEMPTION

Section VI of the BIC Exemption would provide relief for a Section 406(a) violation that arises when a retirement investor purchases an insurance or annuity contract from an insurer that is a “party in interest” with respect to the plan or IRA as a result of a pre-existing services relationship (“Insurance Exemption”). The Department notes that, while PTE 84-24 would provide an exemption for purchases of fixed and variable annuities by some retirement investors (small plans and participants), it would not exempt IRA purchases of variable annuities. As we discussed herein, we believe strongly that PTE 84-24 should continue to be available for all annuities.

The new Insurance Exemption within the BIC Exemption would provide relief for IRA variable annuity purchases. It would also permit plan investors, who must use the BIC Exemption for investment recommendations, to rely on a single exemption (the BIC Exemption) to provide relief for both the recommendation to purchase the contract as well as the sale of the contract by a party-in-interest insurer.⁵⁸

The conditions of the Insurance Exemption are straightforward and are, in large part, similar to PTE 84-24’s: (1) the transaction must be effected by the insurance company in the ordinary course of its business, (2) the combined total of all fees and compensation received by the insurance company and any Affiliate may not exceed reasonable compensation; (3) the purchase must be for cash only; and (4) the terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm’s length transaction with an unrelated party.

Prudential requests that the Department reconsider the condition requiring that the retirement investor purchase the annuity with cash. This condition is not included in PTE 84-24. In-kind purchases can be very advantageous to the purchaser. An insurer may be willing to accept a lower premium in exchange for securities that match its investment portfolio. It can avoid transaction costs and can share that savings with the customer. We suggest that Section VI(b)(3) describing one of the conditions of the Insurance Exemption be amended as follows:

(3) The purchase is for cash only, provided that some or all of the premium may be paid with assets other than cash if (a) no advice is provided by the Adviser, Financial Institution or insurer regarding the fair market value of the assets used by the Retirement Investor to purchase the insurance or annuity contract; and (b) the non-cash assets are valued at their fair market value

⁵⁷ See e.g., 80 Fed. Reg. 21986 (providing no person has a right to examine the Financial Institution’s privileged trade secrets or privileged commercial or financial information).

⁵⁸ 80 Fed. Reg. 21977. ERISA Section 406(a)(1)(A) (and Code Section 4975(c)(1)(A)) prohibit a plan engaging in a sale or exchange (e.g., a purchase) with a “party in interest” (or a “disqualified person” under the Code). An annuity issuer who already has pre-existing (even if independent) services relationship with a plan or IRA is a party in interest (or disqualified person). ERISA Section 3(14)(B); Code Section 4975(e)(2)(B).

as of the date or dates of the purchase utilizing objective third party sources such as price quotations from persons independent of the issuer or independent third party pricing services for the non-cash assets (in instances where there is a generally recognized market for the assets) or utilizing an objective and generally recognized methodology for valuing the non-cash assets that is approved as reasonable by the Retirement Investor; and

VIII. APPLICABILITY DATE

Financial Institutions will need time to effectively implement the Proposals—certainly more than eight months, as the Department currently proposes. Particularly for large institutions, significant time and resources are required to design, build, test and roll out the systems and software on a scale that the extensive conditions of the Proposals will require. In fact, considerable resources have already been expended to merely understand the elements, conditions, and implications of the Proposals, and if you only take into account in-house counsel time, those hours already exceed those estimated by the Department. The BIC Exemption's disclosure and recordkeeping requirements alone will require large Financial Institutions to both mine current systems for the relevant data *and* build entirely new systems to account for the new required data points, a complicated undertaking that requires the careful coordination of many internal and external resources. Preparing to comply with the Department's data requests under the BIC Exemption will require the development and implementation of new databases and software, which Financial Institutions currently neither have nor need. These systems must efficiently generate the data in response to a Department request without disruption to the Financial Institution's day-to-day operations.

We note that the Department granted a two year implementation period for other recent regulatory efforts, and the requirements of those regulations were much less extensive than the Proposals. The industry along with plan administrators had over two years to comply with the extensive changes to the Form 5500 Schedule C reporting requirement and over two years to develop the necessary processes and systems to implement the point-of-sale disclosures under Section 408(b)(2). The system design and implementation requirements of the Proposals are more extensive than the requirements in these earlier initiatives.

It is important to note that these technology enhancements, while extraordinarily significant, are only one of many far reaching tasks that would be required to implement the proposed changes. For example, an inordinate amount of effort and resources would be required to validate compliance of existing processes with new rules and implement all required alterations. Effective implementation of any policy change must always include considerable internal coordination and training, and external communication and education with impacted stakeholders including internal divisional partners and constituents, external plan sponsors, participants, intermediary partners, investment partners, and IRA account holders, to name a few.

An insufficient implementation timeline could cause providers to suspend many services their customers have become accustomed to receiving, in order to avoid inadvertent liability. Poor implementation of these changes would severely disrupt longstanding relationships and expectations between customers and their providers. In Prudential's view, therefore, it is imperative that the Department extend the applicability date for the Proposals. We strongly recommend that this date occur within a timeframe of no less than 24 to 36 months after the final rules are published in the Federal Register.

Prudential appreciates the opportunity to submit comments on the Department's Proposals. Should the Department have any questions or wish to discuss our comments on the Proposals, please contact Robert J. Doyle, Vice President, External Affairs, at robert.j.doyle@prudential.com or 202-327-5244.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Susan Blount', with a stylized, flowing script.

Susan Blount
Executive Vice President and General Counsel